Construction & General Laborers, Local No. 304, Laborers' International Union of North America, AFL-CIO (Associated General Contractors of California, Inc. and Bay Counties General Contractors Association) ***and*** **Juan Vazquez.** Case 32-CB-998

December 3, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On March 2, 1982, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

We adopt the Administrative Law Judge's conclusion that Respondent violated Section 8(b)(2) of the Act by refusing to dispatch Juan Vazquez on May 6, 1981, to a job for which he was otherwise eligible and qualified to fill because he had not completed and turned in a hiring hall registration form containing waiver-of-suit language which violated Section 8(b)(1)(A) of the Act. In so doing, we note that the Administrative Law Judge found that, although Vega, Respondent's dispatcher, did not dispatch Vazquez to the job because Vazquez had failed to complete and submit the "qualifications" portion of the form, Respondent's failure specifically to advise him that he need not execute the waiver-of-suit portion of the form in order to receive a dispatch necessarily had the foreseeable effect of discouraging him from completing and submitting the form at all. The Administratrive Law Judge further found that as a result of Respondent's failure to clarify the situation Vazquez was confused as to whether Respondent was required him to execute the waiver, and that Vazquez in fact did not submit the form at all on May 5 because he believed, albeit mistakenly, that it would be futile to do so unless he also executed the waiver. Accordingly, we agree with the Administrative Law Judge that Respondent held out as at least an apparent condition for dispatch completion of *both* parts of the form; i.e., the qualifications section and the waiver-of-suit section which violated Section 8(b)(1)(A). We further agree with the Administrative Law Judge that, under these circumstances, Respondent could not escape liability for its unlawful conduct by relying on Vazquez' failure to fill out the lawful qualifications portion of the form. Finally, contrary to our dissenting colleague, under the circumstances here we are not persuaded that the absence of an explicit reference to the waiver provision during the May 5 conversation at the hiring hall is significant, nor are we willing to conclude that Vazquez' failure to complete and submit the qualifications portion of the form was unrelated to the presence of the waiver provision on that form.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Construction & General Laborers, Local No. 304, Laborers' International Union of North America, AFL-CIO, Hayward, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Using forms to be completed by members or applicants for referral in its hiring hall registration and referral processes containing any waivers of the right to sue the Union, its agents, or representatives which may be taken to encompass members' or applicants for referral's rights to file charges with, or otherwise have access to, the Board's processes.

(b) Refusing to refer otherwise eligible members or applicants for referral through its hiring hall because they have failed to complete and submit to the Union any form which contains language waiving the right of members or applicants for referral to have access to the Board's processes.

(c) In any like or related manner restraining or coercing members or applicants for referral in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

[1] In adopting the Administrative Law Judge's conclusion that Respondent's use of registration forms containing waiver-of-suit language violated Sec. 8(b)(1)(A) of the Act, we find it unnecessary to pass on his alternative rationale that the use of the forms violated Respondent's duty of fair representation.

[2] We shall modify the Administrative Law Judge's recommended Order to provide, *inter alia*, for the inclusion of general cease-and-desist language and to conform to our usual remedy in cases involving a union's refusal to refer an employee to employment in violation of Sec. 8(b)(1)(A) and (2) of the Act. See *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB 564 (1981).

(a) Treat as null, void, and of no force or effect any signed waiver of the right to sue the Union, its agents, or representatives executed by any member or applicant for referral in the course of his or her use of the Union's hiring hall.

(b) Notify Dinwiddie Construction Company, in writing, with copies furnished to Juan Vazquez, that it has no objection to the hiring or employment of Vazquez, and request Dinwiddie Construction Company to hire Vazquez for the employment which he would have had were it not for Respondent's unlawful conduct, or substantially equivalent employment.

(c) Make whole Juan Vazquez for any loss of pay or other benefits he may have suffered by reason of the discrimination against him from the date of Respondent's unlawful conduct until he obtains the employment which he would have had were it not for Respondent's unlawful conduct, substantially equivalent employment with Dinwiddie Construction Company, or substantially equivalent employment elsewhere, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(d) Post at all places where notices to applicants for referral and members are posted copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER FANNING, dissenting in part:

I agree with the Administrative Law Judge's finding that Respondent's use of a hiring hall registration form containing waiver-of-suit language violated Section 8(b)(1)(A) of the Act. I am unable to find, however, that the evidence establishes that Respondent refused to refer to Juan Vazquez because of his failure to sign the waiver provision of the registration form. I therefore dissent from my colleagues' finding that Respondent violated Section 8(b)(2) of the Act by failing to refer Vazquez on May 6, 1981.

As credited by the Administrative Law Judge, the evidence shows that Respondent routinely used the registration form to determine the qualifications and experience of individuals seeking referral from its exclusive hiring hall. The dispatcher periodically requested those registrants at the top of the dispatch list to complete the qualifications portion of the registration form. Registrants were also asked to sign the qualifications section of the form.

The credited evidence shows that on May 5 dispatcher Vega followed Respondent's practice of distributing registration forms to those individuals who were about to be dispatched. Vega asked Vazquez to "fill out the card and sign it" and told Vazquez he needed to know his job classification in order to send him to work. Vazquez refused to submit a card, saying he would talk to his father who "knew a lot about the Union and politics." Vazquez returned to the hall on May 6 but did not turn in a registration form. When Vega dispatched Ben Rodriguez to a jackhammer operator job later that morning, Vazquez asked why his name had been skipped. Vega answered that Vazquez had not returned his job classification card and Vega did not know his qualifications. Vazquez accused Vega of being "crooked" and "making [his] own rules to screw up the members." At that point Vazquez gave Vega a card with the qualifications section filled out and signed, but with the waiver provision unsigned. Vazquez then left the hall.

Vazquez appeared at the hiring hall on May 7 and was informed by Vega that there was a jackhammer operator job for him. The job was with the same company that Rodriguez had been referred to the day before. Vazquez told Vega he wanted the job that was given to Rodriguez; he also asked Vega for some sort of "guarantee." Vega asked if Vazquez was refusing the job. Vazquez said he did not want it and left the hall. Vega then took Vazquez' name off the referral board.

I find that the credited evidence regarding the events of May 5, 6, and 7 fails to reveal any connection between the waiver provision of the registration form and Respondent's failure to refer Vazquez on May 6. Respondent had a legitimate interest in requiring Vazquez to disclose his job classifications. Pursuant to Respondent's practice, dispatcher Vega communicated this requirement to Vazquez. Vega did not mention the waiver section of the registration form at any time. In fact, the Administrative Law Judge found that Respondent's reason for bypassing Vazquez on May 6 was the latter's failure to fill out the qualifications portion

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the registration form, and not any refusal to sign the waiver clause.

As for Vazquez' motive in refusing to submit the qualifications information, I do not believe that the credited record evidence establishes that Vazquez' conduct was related to the waiver provision. I find it particularly noteworthy that neither Vega nor Vazquez mentioned the waiver provision during their conversations at the hiring hall. Vega's failure to mention the waiver is in accord with the Administrative Law Judge's finding that Respondent bypassed Vazquez because he did not disclose his job qualifications. Vazquez' failure to raise the subject indicates that the waiver clause was not the reason for his refusal to submit the registration form. Since the remainder of the credited evidence is consistent with this inference, I would dismiss that portion of the complaint.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence and arguments, the National Labor Relations Board (Board) has found that we violated employees' rights under the National Labor Relations Act, as amended, by using forms in our hiring hall which, among other things, contain language which amounts to a waiver of the right to sue the Union, its agents, or representatives and by refusing to refer Juan Vazquez to a job on May 6, 1981, because he had not completed and submitted such a form to us.

> Section 7 of the National Labor Relations Act gives employees the right to engage in self-organization, to form, join, or assist labor unions, to bargain collectively with their employers through representatives of their own choosing, to engage in other group activities for their mutual aid and protection on the job, and to refrain from any or all the above activities, except when that right has been limited by a lawful union-security clause requiring membership in a union after a certain grace period as a condition of employment.
>
> WE WILL NOT use forms in our hiring hall registration and referral process which contain a waiver of the right of members or applicants for referral to use the Board's processes.
>
> WE WILL NOT refuse to refer otherwise eligible members or applicants for referral through our hiring hall because they have failed to complete and submit to us any form which contains language waiving the right of members or applicants for referral to have access to the Board's processes.
>
> WE WILL NOT in any like or related manner restrain or coerce members or applicants for referral in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.
>
> WE WILL treat as null, void, and of no force or effect any waivers of the right to sue us, agents, or representatives which were signed by any member or applicant for referral in the course of his or her use of our hiring halls.
>
> WE WILL notify Dinwiddie Construction Company and Juan Vazquez, in writing, that we have no objection to his hire or employment, and WE WILL request Dinwiddie Construction Company to hire him for the employment which he would have had were it not for our unlawful conduct, or for substantially equivalent employment.
>
> WE WILL make Juan Vazquez whole, with interest, for any loss of pay or other benefits he may have suffered as a result of our discrimination against him.

CONSTRUCTION & GENERAL LABORERS, LOCAL NO. 304, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: Juan Vazquez[1] an Individual, filed unfair labor practice charges under Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (herein called the Act), on May 7, 1981,[2] against Construction & General Laborers, Local No. 304, Laborers' International Union of North America, AFL-CIO (herein called the Union). Following investigation, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against the Union on June 18.

The complaint alleges in substance that the Union, in the operation of an exclusive hiring hall pursuant to contract with a construction industry association of employers, unlawfully required employee-users of the hiring hall, as a condition of said use, to sign forms generally amounting to a waiver of their right to sue the Union and its agents. The complaint further alleges specifically that Vazquez was denied a referral through the hiring

[1] The spelling is correct. Pre-trial pleadings incorrectly spell his name "Vasquez" and the same were permitted to be amended, upon the General Counsel's motion, to conform to the correct spelling.

[2] Hereafter, all dates are in 1981, unless otherwise indicated.

hall on May 6 to a job for which he was otherwise eligible because he refused to sign the waiver in question, and that, thereafter, the Union has continued to deny Vazquez referrals for the same reason.

The Union duly answered, admitting facts warranting the exercise of the Board's jurisdiction, and that certain individuals were its agents, but denying any wrongdoing.

I heard the matter at the hearing in Oakland, California, on January 4, 1982. Timely post-trial briefs were filed by the Union and the General Counsel, which I have carefully considered.

Issues

As narrowed by the admitted facts, these are the principal questions presented for decision:

1. Does the Union's admitted use of a form in its referral process which contains, *inter alia*, certain waiver-of-suit language, unlawfully restrain or coerce employees in the rights guaranteed in Section 7 of the Act and thereby violate Section 8(b)(1)(A) of the Act?

2. Was the Union's admitted refusal on May 6 to refer Vazquez to an available job for which he was otherwise eligible based on Vazquez' failure to sign the waiver portion of the form; and, if so, did such action constitute a proscribed causing or attempt to cause an employer to discriminate against Vazquez within the meaning of Section 8(b)(2) of the Act?

3. Did the Union similarly fail to refer Vazquez after May 6 because Vazquez refused to sign the waiver?

Upon the entire record, I make these:

I. FINDINGS AND PRELIMINARY CONCLUSIONS

A. *Undisputed General Practices*[3]

1. General background

The Union, along with certain other locals of the Laborers' International Union of North America, AFL–CIO, is a member of Northern California District Council of Laborers (District Council), an umbrella organization which bargains labor agreements for its local union constituents with various employers and employer associations, including Associated General Contractors of Northern California, Inc. and Bay Counties General Contractors Association (jointly, the Association).

There is currently in effect a "Laborers Master Agreement" (Master Agreement) with the Association which provides, *inter alia*, for the operation of exclusive hiring halls by the Union and other local union constituents of the District Council. By those provisions, employer-members of the Association must use union-run hiring halls to draw their employees for construction industry laborer jobs of various types defined in the Master Agreement.[4]

2. Hiring hall and referral procedures

The Union operates hiring halls in Hayward and Oakland, California (and in a third, unnamed location), which are used to refer jobseekers to jobs with employer-members of the Association doing construction work within the Union's geographical jurisdiction. Traditionally, a jobseeker becomes eligible for referral by submitting his name for insertion on a "plug board" maintained in these halls. The plugboard is arranged in a series of alphabetized rows, each row containing about 20 numbered plugholes. The most recent registrant's plug is inserted in the last open hole on the plugboard, and his plug is gradually rotated up to the optimum "A-1" position as prior registrants are referred to jobs. In practice, until a registrant's plug has reached at least the "C" row, he has no realistic chance of referral in the near future.

Referrals to jobs with Association employers do not necessarily occur strictly in order of plug position. Normally, employers call for laborers with specific prior experience; and if the registrant in the "A-1" position on the board does not have such prior experience he will be bypassed by the Union's dispatcher in favor of the first registrant down the board who does have such experience.

In order to determine the range of experience of registrants, many of whom are unknown to the dispatcher in the hiring hall,[5] registrants are periodically urged by the dispatcher to complete a "qualifications" form provided by the Union which contains a listing of over 100 typical laborer tasks with a space provided opposite each task for checking by the registrant if he believe himself too be qualified. While a registrant's name may be placed on the plug board without his having first completed the qualifications form, the dispatcher will normally require him to complete the same when his name has moved up the board to a point where it is likely that he will be referred in the near future.[6]

3. Introduction of new forms containing waiver-of-suit language in addition to "qualifications" data

At least since February, the Union has been furnished by the District Council with new forms to be completed by registrants. A specimen of the "front" of the form[7] is set forth below:[8]

Name _____ Social Security No. _____
Address _____ Telephone _____

[3] The findings below in sec. 1 through 4 derive either from the parties' stipulations or from the credible and undisputed testimony of witnesses.

[4] Employer-members of the Association collectively purchased and received goods and materials valued in excess of $50,000 directly from suppliers outside California in the 12 months preceding the issuance of the complaint.

[5] The Hayward hall alone typically has up to 200 registrants' names on the plugboard.

[6] The foregoing practices are either expressly authorized by the governing labor agreement or are consonant with its express provisions. See Resp. Exh. 1, sec. 3,B, pp. 8–13.

[7] Consistent with the usage of the Union's agent Moreno, the "front" is the side containing spaces for certain identifying information, as well as the separate box containing "waiver" language. The "back" side contains traditional "qualifications" data.

[8] The original printed form generally contains green print, excepting only the "waiver" provision on the front, which is entirely in red print.

Have you worked at any of the classifications listed on the reverse side within the last five (5) years in the 46 counties of Northern California? Yes _____ No _____
If so, where? _____

OUT	IN	OUT	IN
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The undersigned hereby waives the right to sue this Local Union or any of its agents or representatives with respect to any matter of any nature or kind whatsoever or any claim of any nature or kind whatsoever which arises out of or because of the operation of this hiring hall and the undersigned hereby agrees to specifically and exclusively submit any such claim to the procedures which are specified in the Agreement and/or Rules and Regulations governing the hiring hall. It is specifically understood that use of this hiring hall is not tied to membership in the Local Union which operates this hiring hall.

_____
Signed

I note that the front of the form is "linked" to the back in that it requires the registrant to state whether or not he has worked "at any of the classifications listed on the *reverse* side . . . . ." I note further that the form invites the registrant's signature in two locations, once on the front side, below the "waiver" language, and again on the back, below certain "declaration" language; the latter amounting to a certification by the registrant that he does, in fact, possess experience in any of the listed tasks which he has checked.

4. The Union's use of the form

This form has been in routine use in the Union's hiring halls since it was first furnished by the District Council. There is a testimonial conflict which I resolve below in a subsequent section as to whether or not Charging Party Juan Vazquez was expressly required by the Union to sign the waiver as a condition of referral to a job on May 6. The Union acknowledges, however, regarding its general practice, that its dispatcher periodically distributes such forms to registrants in the upper rows of the plugboard with a simple instruction to the effect: "Those who haven't signed the classification cards, who haven't filled out the classification cards, please fill [them] out" without any express advice that signing the waiver language is optional.[9] It is likewise undisputed, however, that many registrants have been permitted by the Union to retain their plugboard placement and have been referred to jobs without having signed the waiver provision, so long as they have otherwise completed the form (especially the back side and its signature space under the "qualifications" declaration). It is further acknowledged by the Union, however, that many registrants have signed both the waiver and the "qualifications" declaration.

The record further undisputedly reflects that at least some of the forms used by the Union (i.e., some of those forms brought to the hearing by the Union to show examples of registrants in good standing who had not signed the waiver) contain, next to the signature line under the waiver, a handwritten "X." This, I find, is a universally recognized signal that the person to whom a form is given is expected to complete (or sign, in this case) the space adjacent to the "X."

B. *Conclusions as to the Lawfulness of the Union's General Use of the Form*

The complaint alleges that the Union has generally "maintained and enforced a rule requiring employees seeking dispatch through its hiring hall, as a condition of registration, to sign [the above-quoted waiver]" and that this practice violates Section 8(b)(1)(A). Setting aside the question raised by the disputed facts surrounding Charging Party Vazquez' treatment in May, the Union defends its general practice on the ground that it clearly does not "require . . . as a condition of registration" that employees sign the waiver-of-suit portion of the card. The Union here relies on undisputed evidence that many employees have retained their eligibility for referral, and, in fact, have been referred, even though they have not executed the waiver portion.

For reasons elaborated below, I conclude that, while the apparent practice of the Union is not to insist on a jobseeker's execution of the waiver as a condition of registration or referral, the Union's routine instruction to jobseekers that they "fill out" forms which contain such waivers, and especially under circumstances where there is no routine express indication that execution of the waiver is optional, necessarily implies that jobseekers must execute such waivers as a condition of registration and referral. I further conclude that such an implied condition necessarily impinges on the free exercise of rights guaranteed by the Act and, additionally, violates the Union's duty of fair representation, thus violating Section 8(b)(1)(A) of the Act.

I reach these conclusions based on the following considerations: At a minimum, the waiver clause facially re-

[9] I make this finding from the testimony of the Union's vice president, dispatcher, and field representative, Julian Vega. Vega was directly responsible for the operation of the Hayward hiring hall during the period in question and served as its dispatcher. In this portion of his testimony, Vega described a typical process by which he would obtain completed forms from hiring hall registrants. Elsewhere, the Union's business manager, E. L. "Pete" Moreno (who is not normally involved in the day-to-day operation of the Hayward hiring hall) testified that when the new forms were put into use, some registrants asked specifically whether they were obliged to "sign both sides" and that the Union's officials would respond: "If you want to, go ahead and sign both sides . . . that it was up to them, but we did need that they classify themselves." Accordingly, while Moreno's testimony, if credited, would tend to show that, if registrants specifically asked, they were implicitly told that signing "both sides" was optional, such testimony does not undermine the general finding in the main text that registrants were not routinely advised of their option not to sign the waiver.

quires that subscribers forfeit their statutory right to file charges with the Board over disputes about the operation of the hiring hall. Thus, the waiver runs not only to the "right to sue" the Union with respect to "any matter of any nature or kind whatsoever" (itself necessarily encompassing actions over which the Board has jurisdiction), but further expressly includes suits "which arise out of or because of the operation of this hiring hall" (thus making it unmistakable that the waiver encompasses actions over which the Board normally has primary jurisdiction). And, despite the Union's argument that the waiver is silent as to its impact on the right of employees to file "charges" with the Board,[10] the clause further expressly provides that the "exclusive" forum for any claim regarding the operation of the hiring hall shall be the "procedures which are specified in the Agreement and/or Rules and Regulations governing the hiring hall." Thus, the waiver encompasses actions before the Board as plainly as it could without expressly so stating.

It is settled that Section 8(b)(1)(A) is violated when a union restrains or coerces employees in their right of access to the Board.[11]

The Union argues, *inter alia*, that its mere use of the form containing waiver language, under circumstances where it does not, in practice, insist on execution of the waiver, does not "coerce" employees within the meaning of Section 8(b)(1)(A). But the test of coercion is not whether Respondent's practice proves effective in causing employees actually to waive statutory rights, but whether or not Respondent's practice "reasonably tends" to have such an effect.[12] Even if "effectiveness" were a necessary element in proving a case of this type, the same was shown to be the case by the Union's admission that many jobseekers have, in fact, executed the waivers.[13]

In addition, unlike the *Marine & Shipbuiding Workers* and *Blackhawk Tanning* cases, *supra*, where violations were found even after giving special weight to the rights of a union under the proviso to Section 8(b)(1)(A) to prescribe its own "internal" rules binding on its membership, the Union's proviso rights are not implicated herein. Rather, we are dealing with hiring and job referral practices of the Union done *qua* representative of all employees in the bargaining unit, and not merely affecting employees in their membership capacities; and these practices necessarily affect employees' rights of employment with employer-members of the Association.

Under established principles, a union may not use its power to affect employees' employment status as a lever to discourage employees from exercising statutory rights, except to the extent permitted by the union-security proviso to Section 8(a)(3).[14] Here, the Union has tacitly encouraged employees in the belief that their eligibility for referral is linked to their signing the waiver appearing on the face of the otherwise lawful "qualifications" form; and it has thus used its control over the hiring hall system to extract from unsophisticated jobseekers a waiver of an important statutory right.

It does not matter that the waiver is unenforceable *vis-a-vis* Board actions by virtue of the holding in *Marine & Shipbuilding Workers, supra* (which, too, arguably involved a waiver by employees whose "contract" of union membership required that they exhaust internal remedies before filing Board or other legal actions against their union). Employees cannot be presumed to know that their waiver would be held unenforceable were they to test their rights by filing a Board charge against the Union. As the Court said in analogous circumstances in *Marine & Shipbuilding Workers, supra*, regarding the exhaustion-of-remedies requirement therein: "The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge with the Board without exhausting internal union procedures, he would have no recourse against the discipline of the union. *That risk alone is likely to chill the exercise of a member's right to a Board remedy* and induce him to forego his grievance or pursue a futile union procedure." 391 U.S. at 425 (emphasis supplied).

Similarly herein, employees with grievances about the operation of the hiring hall which are properly subject to Board consideration may be expected to forgo resort to the Board because of the waiver they have been induced to sign—and for the very reason that they signed the waiver in the first instance, i.e., their concern that they will not enjoy access to employment through the hiring hall unless they go along with the Union's apparent desires.

From a different standpoint, where, as here, the Union enjoys status as the exclusive collective-bargaining representative of employees in the multiemployer unit of Association employers, and runs and exclusive hiring hall, those employees enjoy a right under Section 7 of the Act "to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[15] To require implicitly of employees it is bound to represent fairly that they waive statutory rights in order to obtain a job through the Union—a condition which is both "irrelevant" to the le-

[10] The Union would have me treat an unfair labor practice charge as somehow being analytically distinct from a "suit" within the meaning of the waiver clause, and, thus, not covered by the waiver.

[11] *N.L.R.B.* v. *Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, et al.*, 391 U.S. 418 (1968), involving a union's fining and expulsion of a member for failing to exhaust internal union remedies before filing a Board charge against his union. There, the Court stated: "Any coercion used to discourage, retard, or defeat that [Board] access is beyond the legitimate interests of a labor organization . . . and we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved." 391 U.S. at 424. See also *International Molders' and Allied Workers Union, Local No. 125, AFL-CIO (Blackhawk Tanning Co., Inc.)*, 178 NLRB 208 (1969), in which the Board found unlawful a union's fining of a member-employee for filing a decertification petition with the Board. Accord: *Tri-Rivers Marine Engineers Union (United States Steel Corporation)*, 189 NLRB 838 (1971).

[12] E.g., *United Steelworkers of America, AFL-CIO-CLC, Local Union 5550 (Redfield Company)*, 223 NLRB 854, 855 (1976), and cases cited.

[13] Since, normally, people do not waive statutory rights gratuitously, it may be presumed that employees who signed the waiver portion did so because they reasonably believed from all of the circumstances set forth above (including the routine instruction that they "fill out" the forms) that they *must* do so in order to perfect their eligibility for referral.

[14] See, e.g., *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423, 428–429 (1969). See also *International Union of Operating Engineers, Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973).

[15] *Miranda Fuel Company*, 140 NLRB 181, 185 (1962).

gitimate needs of te Union in representing its constitutency and which is "invidious" when viewed in the light of established policies favoring unimpeded employee access to the Board's processes—plainly involves a denial of the Union's duty of fair representation. Especially seen from this perspective, the Union's defense that it never *forced* employees to sign the waiver carries with it the suggestion of a trickiness in its dealings with the employees whom it represents which is utterly inconsistent with its duty to represent unit employees' interests fairly.[16]

Inasmuch as I have concluded that the Union's use of registration forms containing waiver-of-suit language unlawfully restrains and coerces employees in one form of protected activity (filing charges with the Board), I need not pass upon the General Counsel's supplemental contention that Section 7 also protects employees in filing other kinds of "suits" against the Union in other forums.[17]

C. *Findings Pertaining to the Union's Treatment of Juan Vazquez in May*

1. Overview

This much is undisputed: Juan Vazquez had been referred from the Union's Hayward hiring hall on two occasions in 1979 and 1980, at which time the "old" forms had been in use which did not contain waiver-of-suit language. After almost a year's absence from the Hayward hall, he again registered thee in December 1980. His name gradually rotated up on the plug board until, by May 5 he was on the "A" row.

On May 5, the Union's Hayward dispatcher, Julian Vega, passed out copies of the "new" form to Vazquez and some other registrants whose names had reached the "A" row. There was a discussion betwee Vazquez and Vega regarding the forms. Vazquez did not turn in the form to Vega and left the hiring hall. He was not dispatched that day,[18] and his plug remained on the board.

On May 6, Vazquez returned to the Hayward hiring hall and was present throughout the normal dispatching hours from 7 to 9 a.m. At or about 8:30 a.m., Vega dispatched two registrants, including Ben Rodriquez, to two jackhammer operator jobs. Rodriquez, at least, was "behined" Vazquez on the board. There was a conversation between Vazquez and Vege as to why Vazquez had been "skipped" in favor of Rodriquez.[19] Vega made some reference to Vazquez' failure to submit a form. Vazquez then handed to Vega a form which he had completed and signed on the back ("qualifications") side, but which he had not signed in the front ("waiver") box.

It is admitted by Vega that he bypassed Vazquez on May 6 for a jackhammer operator job. Vega also credibly testified, however, and I find, absent contradictory evidence, that there were no further job calls on May 6 after Vazquez turned in his completed "qualifications" form.

On May 7, Vazuez again returned to the Hayward hiring hall. At some point, he was summoned by Vega to the dispatch window, where Vega then told Vazquez that he had a job for Vazquez. Vazquez pressed Vega for particulars, as well as for a "guarantee" of some kind. Vega asked Vazquez if he were refusing the job. Vazquez eventually said that he was refusing it. Vega then said that he would pull Vazquz' plug from the board. Vazquez then left the hiring hall in anger. Vegas then pulled Vazquez' plug from the board.

2. Credibility resolutions

a. *As to events on May 5*

Vazquez' testimony, viewed in its most favorable light and ignoring internal contradictions, may be summarized as follows: On May 5, upon being presented by Vega with a qualifications form, Vazquez queried Vega regarding the purpose of the form. Vega made some remark about the front side "relating" to the back, and further explained that a signature was necessary to show that the registrant was taking "responsibility" for the qualifications which he was claiming. Vazquez argued that he could take such responsibility merely by signing the back side. Vega then said that Vazquez "had to sign the front side, too"; and, further, that if Vazquez refused to sign the front side, Vega would "knock [Vazquez] off the board."

Vega's testimony, viewed most favorably, may be summarized as follows: Vega called Vazquez to the dispatch window, handed him a qualifications card, and told Vazquez that he must "fill out the card and sign it." Vega went on to explain that he "needed the card filled, so I would know his classifications to send him to work." Vazquez then said that he would talk to his (Vazquez') father[20] who "knew a lot about the Union and politics." Vega replied that "that was fine with me, but I did need that card, so I could send him out to work." Vazquez then left, taking the qualifications form with him.

After careful study of both witnesses as they testified, and after reviewing the record as a whole, I credit Vega's version as being the more reliable. I formed the impression of Vazquez that he had a tendency to shape his testimony on critical points, specifically regarding the attribution to Vega of an express instruction that Vazquez must "sign the front" or have his plug "knocked off

[16] It is doubtful that the Union would readily embrace its own argument if it were turned around; i.e., if the employees it represents were required by their employers to "fill out" job applications which incidentally contained "yellow dog" waivers, and if the employers defended against 8(a)(1) charges on the ground that they never expressly insisted on a signature under such waivers.

[17] The General Counsel cites no authority for this backstop contention, which does not necessarily mean that it is unsupportable.

[18] Crediting Vega's undisputed testimony, there were insufficient job calls on May 5 to permit the Union to reach Vazquez' plug; and, therefore, Vazquez' failure to be dispatched on May 5 was not due to his failure to complete and submit the new form. The General Counsel does not contend otherwise—indeed, the complaint does not allege that there was any unlawful failure to dispatch Vazquez until the next day, May 6.

[19] Vega acknowledged that there were two persons thus dispatched. Vazquez was only aware of the seeming out-of-order dispatch of Rodriquez.

[20] Vazquez' father was also a member of the Union. Vazquez acknowledged (without specifying the timing) that his father had been dispatched through the hiring hall without even having signed the waiver portion of the qualifications form.

the board."[21] Vazquez did not present a coherent account as to how these latter alleged remarks were made; rather, he needed prompting to offer that testimony. Neither do probabilities favor his version. Vazquez' plug was still on the board when he returned to the hiring hall on May 6.[22] It is difficult to reconcile this fact with an alleged vow by Vega that Vazquez' plug would be removed if he failed to "sign the front" (which Vazquez admittedly failed to do upon allegedly being so instructed by Vega). Moreover, Vazquez testified inconsistently on other related points. For example, he changed his version at least twice as to whether he signed the back of the form on May 5 or May 6, at which latter time he admittedly turned in the form completed entirely except for the waiver. In addition, Vazquez claimed that his brother, Ismael, was present throughout the May 5 exchange between himself and Vega. Ismael was utterly unpersuasive in his various efforts to corroborate his brother on this point. Ismael admitted at one point that he was at some distance from the conversation and that he heard nothing of the exchange, although he later claimed to have heard certain critical words uttered by Vega. I am persuaded that Ismael heard nothing, and that his later versions were prompted by the realization that he was not testifying in his brother's interests.[23] Finally, as Vazquez admits, at least some of his conversation on May 5 with Vega involved Vega's explanations about the need for Vazquez to verify his qualifications. Considering all of the foregoing, including the Union's undisputed general practice in using the "new" forms, I conclude that Vega never expressly told Vazquez that he must "sign the front" or have his plug "knocked off the board."[24]

I further find, however, that Vazquez was subjectively troubled about placing his signature under the waiver language; and I therefore conclude that Vazquez and Vega were talking past one another in their May 5 exchange—with Vazquez trying to find out why he needed to sign the waiver, and with Vega trying to impress upon Vazquez the Union's need to have Vazquez verify his qualifications.[25]

I thus find, in conclusion as to the May 5 exchange, that Vega simply told Vazquez that he must "fill out and sign" the form, stressing the Union's need to have a verification by the registrant as to any qualifications which the registrant claimed to possess. I discuss in my conclusions below whether this finding is exculpatory of the Union in its admitted failure to dispatch Vazquez on May 6 because Vazquez had not turned in any form at all.

b. *As to Events on May 6 and 7*

For reasons similar to those set forth above, I find Vega's version of the May 6 and 7 exchanges between himself and Vazquez to be more reliable. I thus find, consixtent with Vega's testimony, that he intentionally bypassed Vazquez on May 6 for a jackhammer job because, at the point that this job was ripe for filling, Vazquez had not yet turned in a completed form showing his qualifications for particular job tasks.[26] I discredit any testimony by Juan or Ismael Vazquez which may suggest that Vega told Juan Vazquez that it was his failure to sign the waiver which accounted for his having been bypassed.[27]

I further find, consistent with Vega's credited testimony, that when Vazquez returned to the Hayward hiring hall on the morning of May 7, Vazquez' plug was still in its former position on the Board, and was not removed until after Vazquez refused to take the dispatch which Vega offered him.[28] In this latter regard, I credit Vega that he told Vazquez that the job which he had for Vazquez was the same one to which he had dispatched Rodriguez on the previous day; i.e., a jackhammer operator for the same employer, Dinwiddie Construction.[29] I find, and there is little conflict on the point, that Vazquez told Vega that he was unwilling to accept this job because he felt he was entitled to "his" job of the day before (i.e., the one that Rodriguez got) and anything short of that would be unacceptable.

D. *Conclusions Regarding the Lawfulness of the Union's Treatment of Vazquez*

I have concluded above that union dispatcher Vega was not, in fact, moved to bypass Vazquez for dispatch on May 6 because he failed to execute the waiver portion of the form. Rather, the credited evidence preponderates in favor of the interpretation that Vega bypassed

[21] Elsewhere, Vazquez conceded, however, that neither Vega nor any other union agent ever said "anything specifically about the red part"; i.e., the waiver language.

[22] Crediting the testimony of Vazquez' brother, Ismael, and that of Vega. Juan Vazquez unconvincingly testified otherwise.

[23] Ismael was not interviewed during the initial investigation. He gave a written statement to the General Counsel's hearing counsel only a few days before the hearing which tended to corroborate his brother's testimony. But Ismael's hearing testimony was at grave variance with his pretrial statement on several critical points, in addition to being internally inconsistent.

[24] I further do not believe Juan Vazquez' testimony that Business Agent Moreno was present and made similar remarks. Moreno credibly testified that he was working at another hiring hall on that date and only later learned of the Vazquez-Vega encounter.

[25] Assuming that Vazquez was truthful in claiming that Vega made some reference to the front of the form being "related" to the back, it is likely that Vega was not referring to the waiver language on the front, but, rather, to that language at the top of the front which required the registrant to certify that he had worked a certain time minimum on tasks which the registrant had checked on the back.

[26] A union operating a hiring hall may require registrants to furnish some form of verification regarding their background qualifications, and may refuse to dispatch jobseekers who fail to comply with this administrative requirement. See, e.g., *Operative Plasterers & Cement Masons, Local No. 299 (Wyoming Contractors Association, Inc.)*, 257 NLRB 1386, 1395 (1981).

[27] Indeed, I detect no such testimony. There is little contradiction as between their versions and Vega's as to discussions on May 6. I nevertheless credit Vega whenever there may appear to be a conflict.

[28] It was stipulated that the Union normally removes the plug of any jobseeker who refuses to accept a dispatch for a job for which he is qualified.

[29] When Vazquez admittedly completed the qualifications portion of the form and handed it to Vega on May 6, he had indicated that he had experience, *inter alia*, as a jackhammer operator. Accordingly, it was consistent with the Union's undisputed general practice for Vega to have treated Vazquez as being eligible for the May 7 call for a jackhammer operator at Dinwiddie Construction; and Vega's offer to dispatch Vazquez on May 7 therefore does not necessarily suggest that the Union was merely taking steps to "repair" some irregularity in its treatment of Vazquez on May 6.

Vazquez simply because Vazquez had failed to complete and submit the "qualifications" information required on the dual-purpose form. This finding of a lack of improper motivation on the Union's part will often justify dismissal of a refusal-to-dispatch allegation grounded in Section 8(b)(2) of the Act.

Here, however, I am satisfied that the Union's conduct, including in Vazquez' case, of failing specifically to advise jobseekers that they need not execute the waiver portion in order to receive a dispatch, necessarily has the foreseeable effect of discouraging applicants for referral from completing and submitting the form at all. I conclude that Vazquez was at least subjectively confused as to whether the Union was requiring him to execute the waiver portion; and I further conclude that the Union bears responsibility for Vazquez' confusion. Indeed, given my findings above that the Union's practices associated with the use of the dual-purpose forms necessarily encourage employees in the belief that they must sign the waiver as a condition of referral, it is inevitable that a certain percentage of jobseekers would refuse to complete and submit such a form at all, out of the reasonable belief that execution of the waiver was necessary and therefore sensing that completion and submission of the form without signing the waiver would be a futile act.

I further conclude that Vazquez did not submit the form at all on May 5 because he mistakenly believed it would be futile to do so unless he were also to execute the waiver. Since this was a foreseeable response, given the Union's inherently ambiguous requirements, the Union may not now be heard to say that it should escape liability simply because Vazquez failed to fill out that portion of the form which the Union could lawfully require him to complete. Rather, where the Union held out as apparent conditions for referral both lawful and unlawful requirements, it is not the employee's burden to sort out which requirement he must satisfy in order to perfect his eligibility for referral. Accordingly, having been induced to believe in the first instance that he must complete and sign not only the "qualifications" aspects of the form, but the waiver language as well, it was a natural and foreseeable consequence that Vazquez would not submit the form at all out of a proper resistance to waiving his statutory rights. And, where the Union discouraged Vazquez from completing and submitting the form by the inclusion therein of an unlawful condition, the Union would be profiting from its own wrongdoing to be permitted to refuse to dispatch Vazquez for his failure to submit such a form.

Accordingly, I conclude that the Union's actions in refusing to dispatch Vazquez on May 6 violated Section 8(b)(1)(A) and (2) of the Act; and that Vazquez is entitled to be made whole for that wrongful conduct.[30]

The complaint further alleges that "Since . . . May 7, and continuing to date, Respondent, at its [Hayward] hiring hall . . . has failed and refused, and continues to fail and refuse, to dispatch . . . Juan Vazquez to jobs because of Vazquez' refusal to sign a Waiver Card." It is conceded by Vazquez that he never sought referral from the Hayward hiring hall after turning down Vega's May 7 dispatch offer. The General Counsel argues, however, that Vazquez' failure to continue to register for referral after May 7 stemmed from his proper belief that the same would be a futility unless he were to sign the waiver portion of the registration form.

I reject this position. However subjectively confused Vazquez may have been on May 5 as to whether the Union was insisting on his execution of the waiver as a condition of referral, it is clear that, by May 6, he had decided to submit the completed form without signing the waiver; and, by May 7, the Union had accepted this tender and had offered him a referral based solely on his certification of his qualifications. It would, therefore, be unreasonable for Vazquez to have persisted in the belief on and after May 7 that he must sign the waiver as a condition of referral. I do not believe that Vazquez continued to entertain such a misapprehension on or after May 7. Rather, I conclude that his failure to use the Hayward hiring hall after May 7 stemmed from a more generalized sense of resentment about his treatment at the hands of Vega. I therefore conclude, contrary to the General Counsel's position, that it would not have been "futile" for Vazquez to have continued to seek referrals through the Hayward hall without signing the waiver.[31] Accordingly, that portion of the complaint alleging a "continuing" violation of Section 8(b)(2) of the Act on and after May 7 must be dismissed; and the Union bears no remedial responsibility for losses of employment opportunities suffered by Vazquez on and after May 7—the date on which he refused a dispatch and his plug was removed from the board at the Hayward hiring hall.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. The Board has jurisdiction over the instant cause by virtue of the Union's operation of hiring halls for employer-members of the Association whose operations are themselves in commerce or affect commerce within the meaning of Section 2(6) and (7) of the Act.
3. By maintaining a hiring hall registration and referral system which involves the use of forms and related practices which encourage jobseekers in the belief that they must waive their rights to sue the Union or its agents or representatives as a condition of referral to jobs with employer-members of the Association, the Union has restrained and coerced, and is restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.
4. By refusing to dispatch Juan Vazquez on May 6 to a job which he was otherwise eligible and qualified to fill because he had not completed and turned in a certifica-

[30] In accordance with conventional remedial principles, the Union's liability herein will involve, *inter alia*, the payment of backpay to Vazquez gauged by what he would have earned had he been properly dispatched on May 6 to the job which Rodriguez actually received. I discuss separately below whether Respondent's conduct caused further impairment to Vazquez' employment arranting further remedial relief.

[31] Cf. *Pipeline Local Union No. 38, affiliated with the Laborers' International Union of North America, AFL-CIO (Hancock-Northwest, J.V.)*, 247 NLRB 1250 (1980).

tion of his background qualifications, under circumstances where the Union had previously caused Vazquez reasonably to believe that it would be futile to turn in such a form unless he also executed a waiver of his right to sue the Union and its officers or agents, the Union has caused or attempted to cause employers to discriminate against Vazquez for reasons which are proscribed by Section 8(a)(3) of the Act, and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(2) of the Act.

5. The Union's failure to refer Juan Vazquez through its Hayward hiring hall to jobs on and after May 7 stemmed solely from Vazquez' refusal to accept a job tendered to him on May 7 and his subsequent failure to seek referrals through that hiring hall. Vazquez' refusal to accept the May 7 job and his failure to seek referrals through the Hayward hiring hall thereafter was not based on any reasonable belief that he must waive his right to sue the Union. Accordingly, the Union did not violate Section 8(b)(2) by its actions or failures to act on and after May 7.

THE REMEDY

For the Unlawful Use of Dual-Purpose Forms

The vice in the Union's use of forms used primarily to ascertain hiring hall registrants' prior experience or qualifications but which, incidentally, contain waiver-of-suit language is, simply, that jobseekers are necessarily encouraged in the belief that execution of the waiver is somehow necessary or helpful in the securing of employment through the hiring hall. Moreover, the waiver-of-suit language is simply irrelevant to the Union's legitimate needs in administering its hiring halls, or to its proper function as an exclusive bargaining representative.

Because of this, the Union must abandon the use of such dual-purpose forms; and it will not do simply to modify the forms—or the Union's practices—to make clear that employees need not execute the waiver. No matter how conscientiously the Union might try to convince employees that execution of the waiver is "voluntary" or "optional," the mere presence of the waiver on otherwise proper registration forms will inevitably cause jobseekers to believe that their chances for obtaining referrals through the Union will be enhanced by waiving an important statutory right.[32]

Accordingly, I have provided in my recommended Order that the Union immediately cease and desist from its use of the dual-purpose forms at issue herein, and that it refrain thereafter from soliciting or encouraging jobseekers in any like or related manner to waive their right to sue the Union, its agents, or representatives.

In addition, the Union shall post remedial notices at all of its hiring hall operations containing appropriate promises related to the foregoing and further specifying that employees who may have executed waivers-of-suit are not bound thereby and that such waivers are deemed to be void and of no force or effect.

For the Unlawful Failure To Refer Vazquez on May 6

Inasmuch as I have found that the Union wrongfully failed to refer Juan Vazquez on May 6 to a jackhammer operator job at Dinwiddie Construction Co., my recommended Order provides that the Union shall make Vazquez whole, with interest, by paying him backpay equivalent to that which he would have earned had he been given that referral, less interim earnings and any other appropriate offsets to backpay.[33]

[Recommended Order omitted from publication.]

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[32] Jobseekers will properly reason: "If I don't need to sign the waiver, why is it on the Union's form?" And they will properly conclude: "I will be in better favor with the Union—my only avenue of employment with large numbers of construction employers—if I sign the waiver, even though union agents may tell me otherwise."

[33] I do not decide herein, but, rather, leave to the compliance stage, the question whether Vazquez' refusal to accept a referral offered to him by the Union on May 7 constituted an unreasonable failure on Vazquez' part to mitigate the Union's backpay liability. In all respects, backpay and interest due under the recommended Order are to be computed in accordance with principles and policies set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); *F. W. Woolworth Company*, 90 NLRB 289 (1950); and *Florida Steel Corporation*, 231 NLRB 657 (1977). See also *Olympic Medical Corporation*, 250 NLRB 146 (1980).